IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 1251 & 1327

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GARWIN CORPORATION, S'AGARO, INC., JOSEPH WINKELMAN and MILTON MIRSKY,

and

LOCAL 57, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM FOR GARWIN CORPORATION, ET AL. IN OPPOSITION

There are currently pending before this Court three different petitions for certiorari to review the judgment of the Court of Appeals in the instant case. In No. 1257 Garwin Corporation et al. have petitioned the

Court on the issue of whether Garwin violated Section 8(a)(1) and (3) by its move from New York to Miami. In No. 1251 the National Labor Relations Board has petitioned the Court on the issue of whether the Board may, as a remedy for alleged unfair labor practices of the employer, properly order the employer to bargain with the Union at the new Miami location "without requiring the Union first to establish that it has the support of a majority of the Florida employees" (Board Pet., p. 2). In No. 1327 the Union has petitioned the Court on the issue of whether it was arbitrary and improper for the Board to refuse to order Garwin to move its factory back to New York as a remedy for its alleged unfair labor practices.

The position of Garwin Corporation et al. is that the petition in No. 1257 should be granted, but that the petitions in Nos. 1251 and 1327 should be denied. This brief is in opposition to the petitions in Nos. 1251 and 1327.

REASONS FOR DENYING A WRIT OF CERTIORARI IN NO. 1251

The Board in its petition has not shown that the issue on which it seeks to gain review meets any of the standards under Rule 19(1)(b) for the exercise of sound judicial discretion by this Court in granting review. The Board's brief merely claims that the issue is one "of substantial importance" (Board's Pet., p. 8). It disclaims the existence or possibility of a conflict among the circuits by asserting that "since any person affected by a Board order can obtain review thereof in the District of Columbia Circuit under Section 10(f) of the Act (29 U.S.C. 160(f)), there is little likelihood of a conflict developing among the circuits

on the particular question here involved" (Board's Pet., p. 9). This is a *non sequitur* since the same statutory provision also allows persons affected by Board orders to petition for review in the Court of Appeals where the alleged unfair labor practice occurred or where the person aggrieved resides or transacts business. Issues regarding the propriety of Board bargaining orders in cases where the Board has found that the employer moved his plant for an illegal purpose have come before other Courts of Appeal,[1] but the Board has been unable to develop any conflict in the Courts of Appeal on the point.

On the contrary, Board orders to bargain at a location where the Union has not established its majority have run into strong judicial opposition. Thus in the *Rapid Bindery* case, where the Court upheld the Board's findings of independent Section 8(a)(1) and (5) violations, the Court rejected the Board's order requiring the employer to recognize the Union at the new location to which it moved, citing the fact that the "Union does not appear to represent any of the employees in the Tonawanda plant." 293 F. 2d at 177. Similarly in the recent *Cooper Thermometer* case the Second Circuit rebuffed another Board attempt to order an employer, who had violated Section 8(a)(5) in the relocation of his plant, to recognize the Union at the new location in the absence of a showing of the Union's majority there. The Court noted in the *Cooper Thermometer* case that the Board had relied heavily on its decision in the *Garwin* case "which did not com-

---

[1] See, e.g., *NLRB* v. *Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *Cooper Thermometer Co. v. NLRB*, — F.2d — (2d Cir. 1967), 65 LRRM 2113.

mend itself to a majority of the Court of Appeals for the District of Columbia."

Thus, there is not only no conflict in the Courts of Appeal, but the Courts have been unwilling to enforce Board orders in plant relocation cases which require union recognition at the new plant despite the absence of any showing that the union has a majority at such location.

The reliance by the Board on this Court's decision in *Franks Bros. Co.* v. *NLRB,* 321 U.S. 702, is misplaced. There the employer had engaged in a course of conduct at the single location involved, including refusal to bargain with the union and coercion and threats directed against employees. The purpose of the illegal conduct was to dissipate the majority adherence that the union once had at the plant. Since the employee sentiment against the union resulted directly from the employer's illegal threats to employees that he would fire them if they joined or remained in the union, this Court approved the Board's bargaining order. In this case, on the contrary, there is no evidence to show that the union ever enjoyed a majority status among the Florida employees or among the Florida employees and the New York employees who chose to accept reinstatement with back pay and moving expenses for themselves and their families from New York to Miami. Thus at the only plant to be affected by the Board's bargaining order—the Miami facility—there is no showing that the majority of employees want to be represented by this union. The Board attempts to analogize the present case to the *Franks* case by asserting that "it is not unlikely that the new [Miami] employees will learn of the employer's past

unfair labor practices and thus be reluctant to join a union; hence, the unfair labor practices may have 'continuing coercive effects' ". (Board's Pet., p. 11). But this is the purest kind of speculation and conjecture and finds no evidentiary support in the record.[2] As far as this record discloses, the Miami employees are free agents and their choice of bargaining representative cannot possibly reflect the past alleged unfair labor practices of this employer, which involved a wholly different group of employees. As the Court of Appeals correctly noted, the compulsory bargaining order in the *Franks* case simply "put into effect what these workers had voted." The rationale is wholly inapplicable to a plant relocation case, where the employees at the new location have never registered their choice of a bargaining agent.

In its petition for certiorari the Board renews its argument that it can fashion a remedy that requires some abridgement or "yielding" of the basic statutory right of the Florida employees to have a bargaining representative of their own choosing. In relegating these employees to second class citizenship under the Act, the Board reasons that the Florida employees' jobs exist by virtue of (1) Garwin's alleged unfair labor practices; (2) the Board's unwillingness to order the return of the plant to its original location; and (3) the failure of the alleged discriminatees to replace them by accepting reinstatement. By this reasoning employees are to be deprived of basic rights under the Act because of the fortuitous circumstances that: (1)

---

[2] As the Court of Appeals stated: "[T]here is nothing in the record suggesting that the Florida workers were aware of what had occurred in New York."

Their employer, unknown to them, had committed unfair labor practices at another location; (2) a policy of the Board; and (3) the failure of the New York employees to exercise their statutory rights. At a glance it is evident that the Florida employees, whose rights are being deprived, have no control over any of the circumstances asserted by the Board in support of the deprivation.

The position taken by the Board in impressing this Union on the Florida employees without regard to whether a majority of the employees at the Florida location desire the Union as their bargaining agent is in square conflict with the ruling of this Court in *Garment Workers Union* v. *NLRB*, 366 U.S. 731, that "there could be no clearer abridgement of § 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity," than to grant "exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority." The clear abridgement of Section 7 rights is no less here because ordered by the Board than it was in the *Garment Workers* case where such recognition was a matter of voluntary agreement between the employer and union. This Court said in that case that majority rule was a basic premise of the Act and that the prohibitions of the Act "will go far to assure freedom of choice and majority rule in employee selection of representatives."

REASONS AGAINST GRANTING A WRIT OF CERTIORARI IN NO. 1327

The only point in the Union's petition for certiorari appears to be the unsupported contention that by declining the draconian remedy of requiring the employer to move back to New York the Board acted "arbitrarily or at large." (Union Pet., p. 9). This Court does not sit to review allegations of arbitrariness of administrative agencies. The union points to no conflict within the Circuit Courts of Appeal arising out of the holding of the Court of Appeals in the instant case that the Board's rejection of the Union's proposed remedy "was not an abuse of discretion." Nor does the Union petition present an important question of federal law which has not been, but should be, settled by this Court. It is inconceivable that this Court would implement a remedy that the Board itself has rejected as too drastic. And finally, the Union has pointed to no decision of this Court with which the decision of the Court of Appeals on this point is allegedly in conflict.

The Union argues, in the face of the strict requirements of Rule 19(1)(b), that the petition should nevertheless be granted so that this Court "will have the whole range of remedies before it . . ." (Union Pet., p. 8). This not only assumes that this Court will grant certiorari in No. 1251, but that if certiorari is granted in that case, the Court will be precluded from examining the whole range of actual or possible Board remedies by its failure to grant certiorari on the Union's petition. These assumptions are unwarranted.

Viewed on its merits the Union's proposed remedy, as the Board and Court found, would not effectuate

the purposes of the Act. The Board recognizes that a move-back order would, in many cases, result in the employer's exercise of his right to go out of business entirely. Cf, *Textile Workers* v. *Darlington Co.*, 380 U.S. 263. Exercise of this right would mean a permanent loss of employment opportunity for both the employees at the old and the new locations, and would in no way effectuate the policies of the Act. Thus a move-back order would be largely self-defeating.

CONCLUSION

For the reasons specified above, Garwin Corporation et al. respectfully oppose the petitions for certiorari of the Board in No. 1251 and the Union in No. 1327.

Respectfully submitted,

GUY FARMER
JOHN A. MCGUINN

PATTERSON, BELKNAP, FARMER,
SHIBLEY & WELLS
1120 Connecticut Avenue
Washington, D. C.

JOSEPH A. PERKINS
M-107 Biscayne Building
Miami, Florida